UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 97-22529

JOHN R. BUTTON,

Debtors. **DECISION & ORDER**

JOHN A. BELLUSCIO, TRUSTEE,

Plaintiff,

V. **AP #98-2045**

JOHN R. BUTTON,

Defendant.

BACKGROUND

On July 2, 1997, the Debtor, John R. Button ("Button"), filed a petition initiating a Chapter 7 case. Button's spouse, Wendy L. Button ("Wendy Button"), did not file. On the schedules and statements required by Section 521 and Rule 1007 that Button finally filed on August 6, 1997, he indicated that: (1) he was not entitled to any tax refunds (Schedule B, Question No. 20); (2) he had unsecured claims against him of approximately $640,000, over 95% of which were related to his failed sporting goods business, World Champion Sports, Inc. ("WCS"), including approximately $250,000 due to Terence M. Cullen ("Cullen") in connection with the purchase of Cullen Sporting Goods and $180,000 due to Howard Meath ("Meath"), also for the purchase of a sporting goods business; and (3) there was a prepetition wage garnishment against him in favor of Rosemarie Button, his mother.

On July 11, 1997, the Office of the United States Trustee appointed John Belluscio, Esq. (the "Trustee") as Button's Chapter 7 Trustee. An initial Section 341 hearing and meeting of creditors was conducted by the Trustee on August 7, 1997. A minute report of that hearing filed by the Trustee indicated his concerns about Button's income and expense budgets, specifically the food expense of $1,300 for a family of six, and whether it would be appropriate for a motion to be filed to have Button's Chapter 7 case dismissed as a substantial abuse pursuant to Section 707(b).

The minute report of an adjourned Section 341 hearing conducted on September 10, 1997, indicated that the attorneys who appeared at the hearing on behalf of Cullen and Meath had requested copies of numerous documents from Button which he was to produce before October 1, 1997 so that they could be reviewed prior to a further adjourned Section 341 hearing scheduled for October 29, 1997.

On September 10, 1997, Button filed amended schedules and statements which now indicated that: (1) he had a retirement account with Travelers that had a balance of approximately $93,000 which he claimed as exempt; (2) he owned securities, valued at approximately $42,000, in Button Brothers, Inc. and Herkimer Wholesale (collectively, "Button Brothers"), a failing family owned business which had been seized by secured creditors; (3) there were family members who held secured claims against him of approximately $825,000, once again in connection with Button Brothers, which had not previously been scheduled; (4) in 1996, he transferred his tenancy by the entirety interests in his residence and two investment properties to Wendy Button, however, the first mortgage holders on the two investment properties had since foreclosed on the investment properties; (5) he and Wendy Button had a combined gross annual income of approximately $134,000, ($11,166 monthly), net annual take home pay of $92,700 ($7,725 monthly), and annual

expenses of in excess of $110,000 ($9,166 monthly) for their family of six; and (6) the Buttons' monthly "family expenses" included $4,715 for mortgage principal, interest and real estate tax escrow, $500 for electricity, $100 for telephone, $1,300 for food, $300 for clothing and $410 for recreation, clubs, entertainment and newspapers and magazines.

On September 16, 1997, Meath filed a Motion (the "Creditor Extension Motion") which requested an Order extending the time for the creditors and the Trustee to object to the Button's discharge and to file complaints to determine the dischargeability of any of his individual debts. The Motion alleged numerous grounds to establish cause, including: (1) Button's initial schedules did not disclose his claimed exempt retirement account, transfer of interests in real estate to Wendy Button, and shareholder interests in Button Brothers; (2) Button had failed to bring checking account statements and other bank documents to his 341 hearings, and at the September 10, 1997 hearing he acknowledged that prior to the filing of his petition he had on occasion deposited his wages into Wendy Button's individual checking account; (3) there was conflicting information as to whether Button had an interest in a riding academy ("Hunters Run") which he claimed was solely owned and operated by Wendy Button; and (4) Button had generally failed to produce adequate records concerning his prepetition financial affairs.

On September 24, 1997, the Trustee filed his own motion (the "Trustee Extension Motion") which requested that his time to object to Button's discharge be extended, because he had not yet received the requested information and documentation that was necessary for him to complete his investigation into Button's assets and financial affairs.

On September 29, 1997, Button filed Affidavits in Opposition to the Creditor and Trustee Extension Motions that did not oppose the requests for extensions of time, but alleged that: (1) his

filing was an emergency filing necessitated when a judgment creditor obtained a state court installment payment order requiring him to pay $1,000 per month in addition to an existing garnishment in favor of his mother; (2) his income had been reduced by over $4,000 per month when the secured creditor of the financially troubled Button Brothers required that all officer salaries be substantially reduced; (3) since the business failure of WCS in 1992, he had paid in excess of $500,000 to the creditors of that business in an attempt to avoid bankruptcy; (4) he had deposited his paycheck into his wife's individual checking account at times before he filed his petition because he was unable to have his own checking account, since every time he opened one, judgment creditors would execute on it, and "other than being able to participate with my wife in determining what family expenses were paid out of that account, I have no control over that account;" (5) he never had an ownership interest in Hunters Run, and "my wife, Wendy, is an accomplished businesswoman in her own right;" and (6) he would use all of his abilities to obtain any documents that the creditors requested in writing.

On October 1, 1997, an Order was entered which extended to November 30, 1997 the time for the Trustee and Button's creditors to bring a complaint objecting to his discharge and for Meath to bring a complaint objecting to the dischargeability of any debts due to him or any entities related to him.

On October 28, 1997, Button again amended his schedules and statements. These amended schedules and statements for the first time: (1) listed a 4.5% interest which Button had with other family members in real property located at 2090 Central Avenue, Schnectady, New York; (2) indicated Button's interest in a $100,000 Connecticut Mutual Life Insurance policy on the life of Rosemarie Button; (3) indicated that Button owned shares in a number of insolvent, and apparently

family related, companies; (4) disclosed that Button held a note payable from Button Realty valued at $87,600; and (5) once again stated that Button had no interest in any tax refunds (Amended Schedule B, Item 17).

The minute report of an adjourned Section 341 hearing conducted on October 29, 1997, indicated that the Trustee had received various copies of documents from Button's counsel, which he needed to review, and that a further adjourned hearing was scheduled for December 17, 1997.

On November 26, 1997, the Trustee and Meath filed a joint Motion requesting an Order further extending the time to bring complaints objecting to the Debtor's discharge, and in the case of Meath and related entities the dischargeability of any individual obligations. This Motion, which was served on Button and his attorney by mail on November 26, 1997, alleged that the Trustee and the creditors had been unable to examine the Debtor concerning such crucial matters as "the concealment, destruction, falsification or failure to keep books and records from which the Debtor's financial condition and transactions could be ascertained." On December 29, 1997, an Order was entered which further extended to March 17, 1998 the time for the Trustee, creditors and Meath and his related entities to file complaints.

On December 31, 1997, the Trustee filed and served by mail a Motion (the "Motion to Produce") that requested an Order requiring Button and Wendy Button to produce and turn over to the Trustee certain recorded information. Included as Exhibit A to the Motion to Produce was a copy of a September 19, 1997 letter (the "Document Demand"), previously forwarded to Button's attorney, which demanded that Button produce, among other documents: (1) "every check that he and/or his wife wrote from January 1, 1991 through and including the present;" and (2) "all checks, invoices, records, receipts, budgets and bills of sale, receipts and any other recorded information

reflecting Debtor's and his family's household, personal and living expenses, the incurring thereof, and the payment thereof on or after January 1, 1991 through and including the present including those incurred by members of Debtor's immediate family and the payment thereof."

On January 12, 1998, Button's attorney interposed an Answering Affidavit in connection with the Motion to Produce which: (1) objected to the production of any documents by Wendy Button, since she was not a co-debtor in the case; (2) included as an exhibit, copies of documents previously turned over to the Trustee, among which were copies of the Debtor's 1996 tax returns; and (3) indicated that many of the requested documents, such as bank statements and canceled checks from past years, were no longer in the possession of Button or Wendy Button and could not be reproduced without substantial cost. On March 11, 1998, after a series of adjournments, the Trustee withdrew the Motion to Produce, apparently satisfied that Button had finally produced all of the requested prepetition documents which Button then had in his possession.

On March 18, 1998, the Trustee commenced an adversary proceeding (the "Adversary Proceeding") against Button that requested an Order denying Button's discharge.

The Complaint in the Adversary Proceeding alleged: (1) postpetition, the Buttons had signed and filed their 1996 federal and New York State income tax returns, and they were entitled to a federal income tax refund in the amount of $27,491 and a New York State income tax refund in the amount of $6,968, for total refunds of $34,459 (the "Refunds"); (2) at the Section 341 hearing conducted on March 4, 1998, Button for the first time advised the Trustee that the Buttons had received the Refunds; (3) by letter dated January 15, 1998, the Trustee had demanded that Button turn over $20,000 of the Refunds which was the portion that the Trustee believed was property of

the estate (the "Refund Demand");[1] (4) Button had failed to turn over any portion of the Refunds and had failed to comply with the Trustee's demand that he fully account for them; (5) Button had concealed the receipt of the Refunds from the Trustee, transferred all or a portion of the estate's interest in the Refunds to persons other than the Trustee or, alternatively, had permitted Wendy Button to conceal the estate's portion of the Refunds from the Trustee in order to transfer it to third parties; (6) Button's actions were taken with the actual intent to hinder or delay the Trustee in obtaining possession of the estate's portion of the Refunds or, alternatively, Button acted with the intent to actually defraud the Trustee and his creditors by failing to timely and properly disclose his receipt of the Refunds and to surrender possession of the estate's portion of the Refunds to the Trustee; and (7) based upon these facts and circumstances, the Court should deny the Debtor's discharge pursuant to Section 727(a)(2)(B).[2]

The Complaint also contained causes of action which requested that Button's discharge be denied pursuant to: (1) Section 727(a)(3), for concealing or failing to keep or preserve recorded

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[1] The Refund Demand stated that: "I have been advised that Mr. Button will be receiving a tax refund in the approximate amount of $20,000. These funds are to be turned over to the undersigned as Trustee. Please advise the current status of these funds."

[2] Section 727(a)(2) provides that:

> [T]he debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be, transferred, removed, destroyed, mutilated, or concealed—
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> (A) property of the debtor, within one year before the date of the filing of the petition; or
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> (B) property of the estate, after the date of the filing of the petition;

information from which Button's financial condition and business transactions might be ascertained; (2) Section 727(a)(5), for failure to satisfactorily explain Button's loss of assets; and (3) Section 727(a)(4), for knowingly and fraudulently making a false oath or account, specifically with respect to Button's failures to disclose required information in his schedules and statements.

On May 26, 1998, after the Debtor had interposed a general denial in answer to the Complaint in the Adversary Proceeding, the Court conducted a pretrial conference. At the pretrial conference Button's attorney advised the Court and the attorney for the Trustee that: (1) before Button received the Refund Demand he did not know that any income tax refund he might be entitled to for the 1996 tax year was property of the estate, or that he was required to hold and immediately turn over to the Trustee all or any portion of the refund; (2) when the refund checks were received, Button, at the request of Wendy Button, endorsed the checks and gave them to her; (3) after Button endorsed the refund checks and gave them to Wendy Button, she spent the Refunds; (4) it was only after the Refunds were received and spent and the Refund Demand was received that Button first consulted with his attorney regarding the Refunds; (5) when Button consulted with his attorney they concluded that the estate's interest in the Refunds was only the amount of Button's 1996 withholdings, approximately $3,300, and not $20,000, approximately one-half of the total Refunds, demanded by the Trustee; and (6) Button was willing to repay the estate the amount of the Refunds which the Court ultimately determined was property of the estate.

On June 3, 1998, the Trustee filed a Motion for Summary Judgment (the "Summary Judgment Motion") which, as it related to the Trustee's cause of action pursuant to Section 727(a)(2)(B) and the estate's interest in the Refunds, alleged that: (1) in a March 5, 1998 letter to the Trustee, sent after the March 4, 1998 adjourned Section 341 hearing, Button's attorney first took the

position, in writing, that Button's and therefore the estate's interest in the Refunds was only $3,300, and it was only then that the attorney advised the Trustee that Button had been responsible for paying the security deposit and first month's rent in the amount of $4,600 on the family's current residence; (2) the Trustee had still not received any portion of the Refunds or a full accounting for their receipt and disbursement as demanded by the him on March 4, 1998; (3) Button signed over his interest and the estate's interest in the refund checks to Wendy Button with the intent to delay the Trustee, if not to hinder or defraud him, in obtaining the estate's interest in the Refunds; and (4) Button's failure since March 4, 1998 to turn over even the $3,300 that he and his attorney acknowledged was the minimum amount of the Refunds that was property of the estate, was done with a continuing intent to hinder and delay the Trustee.

On July 2, 1998, Button filed an Answering Affidavit (the "Button Affidavit") in opposition to the Motion for Summary Judgment which, as it related to the Trustee's cause of action pursuant to Section 727(a)(2)(B) and the estate's interest in the Refunds, alleged that: (1) Button no longer disputed that the Trustee and the estate were entitled to one-half of the Refunds; (2) Button had not disclosed the Refunds on his original schedules because it was only after his accountant prepared the 1996 income tax returns in October 1997, that he realized he was entitled to a refund; (3) "the proceeds of said refund were used for day-to-day family expenses and were not in any way intended to be kept from the Trustee other than for the purpose of feeding and housing my family and providing them with the basic needs of life;" (4) in January 1998, Wendy Button became unemployed so "it was necessary for me to utilize the tax refund monies in order to support my family;" (5) "please also note that the tax refunds were received in late November, or early December, and that I did not receive word from the Trustee relative to requesting those refunds until

January;" and (6) "It should be pointed out that I was the one who supplied the Trustee with my tax return for 1996 indicating that I was entitled to a refund. There was no attempt on my part to hide these refunds from the Trustee."

On July 15, 1998, the Court, finding that there were genuine issues of material fact presented, denied the Motion for Summary Judgment. However, because the Court believed that the allegations made by the Trustee in his cause of action pursuant to Section 727(a)(2)(B) regarding the Refunds were serious and would not require a lengthy evidentiary hearing, it set down that cause of action for an immediate trial on July 29, 1998. At the trial, the attorney for the Trustee read into the record portions of a deposition of Button conducted on July 27, 1998, and the Trustee, Button and Wendy Button testified.

DISCUSSION

I. The Trial

At his July 28, 1998 deposition and the July 29, 1998 trial, Button testified that: (1) at the time he signed his original statements and schedules, Button and Wendy Button had obtained an extension of their time to file their 1996 federal and New York State income tax returns, and he was not aware that they might be entitled to any refunds because, even though they had received refunds in some prior years, they had not discussed the possibility that they might receive a refund for 1996 with their accountant; (2) at the time he signed his original schedules, Button did not carefully read Schedule B, Item 20, so he did not know from reading and signing those schedules that any income tax refunds he might be entitled to for the 1996 income tax year would be property of the estate; (3) at no time prior to his receipt of the Refund Demand had the Trustee or Button's attorney or accountant advised him that any refund that he might be entitled to or have received for the 1996

income tax year was property of the estate which must be held and immediately turned over to the Trustee; (4) at the time he signed his 1996 federal and New York State income tax returns in October 1997, Button never reviewed them closely enough to even be aware that refunds were due, let alone to realize the extent of the refunds, or the possibility that some or a portion of the tax refunds might be attributable to his income and losses; (5) at the time he signed his 1996 federal and New York State income tax returns, Button did not have any conversations with the accountant who prepared the returns regarding either the returns or the refunds shown as due; (5) when the refund checks were received in late November or early December, Button was not even aware that they had been received until Wendy Button requested that he endorse them over to her, which he did; (6) when the refund checks were received and Button endorsed them over to Wendy Button, he made no attempt to review the returns to determine why he and Wendy Button had received refunds that were more than three times more than any prior years refunds, or whether any portion of the Refunds might be attributable to his income and losses; (7) Button did not know whether Wendy Button deposited the refund checks into her Citibank checking account (the "Citibank Account"), and prior to the evening before the trial, July 28, 1998, when Wendy Button located her statement for the period covering December 19, 1997, through January 20, 1998, (Plaintiff's Exhibit 5 at trial), he did not know any of the expenses that Wendy Button actually or allegedly paid from the Refunds; (8) at the time he received the Refund Demand in mid-January 1998, Button believed that all of the Refunds had been expended by Wendy Button even though he did not discuss it with Wendy Button or in any way attempt to determine whether any portion of the Refunds was still in her possession; (9) after receiving the Refund Demand, Button did, however, contact his attorney, at which time: (a) it was confirmed that his portion of the Refunds would have to be repaid to the Trustee; and (b) he and his

attorney agreed on the position that the estate's interest in the Refunds was limited to the amount of Button's 1996 withholdings, approximately $3,300; (10) after consulting with his attorney, Button still did not discuss the matter with Wendy Button, or attempt to determine from her whether any portion of the Refunds were still in her possession; (11) until his conversation with his attorney, after he received the Refund Demand, Button never thought that any of the Refunds were his, since he never believed that he was technically entitled to any refunds in the past, because in prior years: (a) he had always had minimal amounts withheld from his pay, while Wendy Button had significant amounts held from her pay; and (b) Wendy Button had paid any required estimated taxes; and (12) except for Plaintiff's Exhibit 5, the December 19, 1997 through January 20, 1998 Citibank Account statement and the canceled checks honored by the bank during that period, neither he nor Wendy Button had been able to find any other records which would provide a detailed documentary accounting for the receipt, deposit and disbursement of the Refunds, as well as the receipt and disbursement of all other income that Button or Wendy Button had received from the time the refund checks were received to the time that the Refunds were fully disbursed.

At trial, Wendy Button testified that: (1) the refund checks were received at the end of November or the beginning of December, 1997; (2) at her request, Button endorsed the refund checks, and she deposited them into her Citibank Account; (3) she had no records at the time of trial to prove that the refund checks were deposited into her Citibank Account; (4) she did not know the balances in her Citibank Account at the times the refund checks were deposited into the Account; (5) she had sole control over the disbursement of the funds in the Citibank Account, and Button had no input whatsoever into the disbursement of those funds; (6) she used the Refunds to pay bills and living expenses, including past due bills, and although she had some records of the bills and

expenses paid, she had not brought them to the trial; (7) she never had any discussions with her accountant or Button as to whose income or losses the Refunds might be attributable to; (8) other than the expenses evidenced by the canceled checks included in Exhibit 5, she believed she may have also used the Refunds to pay a number of business related bills for Hunters Run, including utilities, the purchase of a used van for approximately $5,000, and the purchase of Christmas gifts; (9) at the time she signed the 1996 federal and New York State income tax returns, she was not aware that there were refunds due, and she had no discussions with the accountant who prepared the returns regarding the returns or the refunds shown as due; (10) when the refund checks were received, she believed that she was entitled to the Refunds because most of the 1996 withholdings which were refunded had been from her income; and (11) she was not at all surprised to have received more than $34,000 in refunds, she was more concerned about being able to pay some of her overdue and current bills.

At trial, the Trustee testified that: (1) in this particular case, prior to sending the Refund Demand, he had not specifically advised Button, either at a Section 341 hearing or in writing, nor had he specifically advised Button's attorney, orally or in writing, that if Button received a refund as a result of the filing of his 1996 federal and state income tax returns, he must immediately turn the estate's portion of those refunds over to the Trustee, or all of the refunds should there be a dispute as to the estate's portion; (2) it was not until the March 4, 1998 adjourned Section 341 hearing that Button or his attorney first advised him that the Refunds had been received, and, at that time, the Trustee immediately demanded that Button fully account for the Refunds within twenty-four hours; (3) the failure by Button to advise him of the receipt of the Refunds and to turn over the estate's undisputed portion had delayed the administration of the estate and caused the Trustee to

incur substantial legal fees; (4) he acknowledged that Button had met his obligation to timely turn over to the Trustee copies of his completed 1996 income tax returns once they were filed; and (5) Button had still not provided him with a full accounting for the receipt, deposit and disbursements of the Refunds to finally establish that the Refunds and all other income received by Button and Wendy Button from the time they received the refund checks had been fully disbursed before Button received the Refund Demand.

At the conclusion of the trial, the Court gave the parties until August 7, 1998 to file any additional written submissions, and specifically afforded Button one last opportunity to provide documentary evidence to establish that the refund checks had been received, deposited and disbursed, together with all other income received by Button and Wendy Button, prior to Button's receipt of the Refund Demand.

II. Section 727(a)(2)(B)

In order to deny a debtor a discharge under Section 727(a)(2)(B), the plaintiff, who bears the burden of proof pursuant to Rule 4005, must prove by a preponderance of the evidence that postpetition, property of the estate was transferred, concealed, or permitted to be transferred or concealed, with intent to hinder, delay or defraud creditors or a Trustee. *In Re Cromer*, 214 B.R. 86, 93 (Bankr. E.D.N.Y. 1997).

Although denial of a discharge, which prevents a debtor from receiving a "fresh start", is a difficult consequence for a debtor to experience, Congress determined that when a debtor's actions fall within the exceptions set forth in Section 727, that debtor is not the "honest debtor" entitled to the extraordinary privilege of a fresh start. This consequence is even more appropriate when the debtor's actions occur postpetition and are directed against the very bankruptcy system from which

the debtor is requesting the privilege of a fresh start, than when the debtor's actions occurred prepetition.

Although the plaintiff bears the ultimate burden of proof under Section 727(a)(2)(B), and has the initial burden to demonstrate the required elements of that cause of action, once the plaintiff has demonstrated a transfer or concealment of property of the estate and sufficient circumstances to indicate that the transfer or concealment was made with the actual intent to hinder, delay or defraud a trustee, the burden shifts to the debtor to produce credible evidence to demonstrate there was no actual intent to hinder, delay or defraud the trustee.

III. Actions Prior to the Refund Demand

This court finds that most of the testimony of Button and Wendy Button lacked credibility, and that their testimony completely lacked credibility when they testified that: (1) at the time they signed their 1996 income tax returns they did not realize that they were entitled to refunds of more than three times the amount they had received in prior years; and (2) at no time prior to or after they received the Refunds did they attempt to do any analysis of the returns, in order to determine why they were entitled to such substantial refunds or whose income and losses may have been responsible for the substantial Refunds.

Nevertheless, because: (1) prior to Button's receipt of the Refund Demand, the Trustee failed to specifically notify Button or his attorney that any refund he was entitled to was property of the estate that must be held and turned over to him; (2) the Trustee is unable to provide any proof that prior to his receipt of the Refund Demand, Button's accountant or attorney otherwise made him

aware that any refund he was entitled to was property of the estate that must be held and immediately turned over to the Trustee, the Trustee has found himself in a position where he is unable to prove that prior to his receipt of the Refund Demand, Button transferred or concealed from him Button's interest in the Refunds with intent to hinder, delay or defraud the Trustee.

Because of the complete lack of credibility demonstrated by Button and Wendy Button regarding the facts and circumstances surrounding the Refunds and their knowledge and actions and inactions regarding the Refunds, no Court could find with any certainty that the Buttons did not know prior to Button's receipt of the Refund Demand that a portion of their 1996 income tax refunds were attributable to the income and losses of Button or that Button did not know that some portion of the Refunds were property of the estate to which the Trustee was entitled.[3] However, based upon the evidence presented, this Court must find that the Trustee simply has not produced sufficient credible evidence to meet his burden to prove his cause of action under Section 727(a)(2)(B) for the periods prior to Button's receipt of the Refund Demand.

IV. Periods Subsequent to the Receipt of the Refund Demand

Section 521 imposes on a debtor the duties to cooperate with a trustee and to turn over any property of the estate to the trustee.[4] It is undisputed that upon his receipt of the Refund Demand

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[3] For many debtors who are not as educated and sophisticated in business as Button, reading the bankruptcy schedules which require tax refunds to be listed as an asset in the property schedule together with a Trustee's request for copies of any income tax returns filed for prepetition periods when it was unclear whether the debtor will receive a refund, would be sufficient to make them aware that all or a portion of any refunds might be property of the bankruptcy estate which the Trustee should receive once the refunds were obtained, or it would at least cause them to ask the Trustee or their attorney the relevant questions that would result in their being advised of this.

[4] Section 521 describes a debtor's duties and provides in part:

> (3) [I]f a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to

and his consultation with his attorney, Button knew that no less than $3,300 of the Refunds, the amount of his 1996 withholdings, was property of the estate, and that if any portion of that $3,300 was still available and unexpended, he had a duty under Section 521 to immediately turn it over to the Trustee pursuant to the Refund Demand. Even if Button and his attorney believed that the Trustee's demand for $20,000 was excessive, that did not relieve Button of his responsibility and duty to immediately account for the Refunds and immediately turn over to the Trustee any unexpended portion of the Refunds, up to the $3,300 that was not in dispute.

Button and Wendy Button both testified that the refund checks were received in late November or early December, deposited into Wendy Button's Citibank Account and fully expended by her prior to Button's receipt of the Refund Demand. However, this testimony is not credible, especially since they have failed to make any genuine effort in the eight months since the Trustee's initial request, to demonstrate this through a complete documentary accounting. Therefore, that testimony alone is not sufficient to meet Button's burden to produce credible evidence that the Refunds were received, deposited and fully expended before Button received the Refund Demand. As a result, this Court can only conclude that some portion of the Refunds remained on hand when Button received the Refund Demand, and that his failure to immediately turn that portion over to the Trustee constituted a continuing concealment and transfer directly to Wendy Button, or indirectly to any others Wendy Button may have later transferred any portion of these Refunds to, with the

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> perform the trustee's duties under this title;
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> (4) [I]f a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title[.]

actual intent to hinder and delay the Trustee from receiving that portion of the estate's interest in the Refunds. Absent the required accounting, this Court finds that the Trustee met his burden under Section 722(a)(2)(B) to show that after Button received the Refund Demand, there has been an intentional concealment of all or a portion of the Refunds that were property of the estate, and a transfer to entities other than the Trustee. Therefore, Button's discharge must be denied.

This Court agrees with the Trustee that by mid-November 1997, any reasonable individual given the questions and concerns raised by the Trustee and the creditors regarding Button's financial affairs, would have immediately began to keep detailed and complete records of all of their financial transactions. That Button and Wendy Button in the face of the questions and concerns raised by Button's Trustee and creditors could have continued to be so careless and cavalier about maintaining their financial records strains the proposition that anything is possible. This is especially true with respect to any funds deposited into Wendy Button's Citibank Account, since the Trustee and the creditors had specifically demanded information about any of her bank accounts being used directly or indirectly by Button. At the March 4, 1998 Section 341 hearing, Button and his attorney were put on notice that not withstanding any dispute between Button and the Trustee as to the amount of the Refunds that were property of the estate, based upon the underlying returns, that interest was not less than $3,300, and the matter could not be finally resolved unless and until Button provided a full and complete accounting for the receipt, deposit and disbursement of the Refunds, as well as any income received by Button or Wendy Button between the dates of the receipts of the refund checks and the disbursement of all of those funds. Despite this clear notice and demand for a full accounting, Button appeared at the trial of the Trustee's 727(a)(2)(B) cause of action without producing the

required accounting, and he even failed to provide the accounting by August 7, 1998, as suggested by the Court at the close of the trial.

What is perhaps the most troubling about Button's actions and omissions in response to the Refund Demand is his testimony acknowledging a complete failure, upon receiving the Demand and consulting with his attorney, to immediately go to Wendy Button to determine what if any portion of the Refunds may still have been in her possession so that he could immediately obtain them and turn them over to his Trustee.

Once Button was notified by the Refund Demand that he had an obligation to turn over the estate's interest in the Refunds in fulfillment of his duty under Section 521(4), he also had a duty upon receipt of that Demand to determine what if any portion of the Refunds were expended, and, if any of the Refunds were unexpended, to obtain those funds and immediately turn them over to the Trustee, at least up to the undisputed amount of $3,300. To the extent that Button failed to fulfill his duty to determine what if any portion of the Refunds may still have been in Wendy Button's possession and if there were any, to obtain them and turn them over to the Trustee, or at a minimum advise the Trustee that there were unexpended Refunds in Wendy Button's possession, this Court finds that if any portion of the Refunds were still unexpended, there was a continuing concealment and transfer by Button with intent to hinder and delay the Trustee. Such a flagrant and reckless disregard by Button of his duties under Section 521(3) and (4) to cooperate with the Trustee and turnover property of the estate after he received Refund Demand could only have been done with the intent to hinder and delay the Trustee from receiving property of the estate.

In determining whether there were unexpended Refunds when Button received the Refund Demand, this Court finds that it is appropriate to employ the Trust Pursuit Rule utilized in allocating

funds when there has been a commingling of funds some of which are impressed with a constructive trust. See *Feuchtwanger v. Central Hanover Bank & Trust Co.*, 288 N.Y. 342 (1942). Employing this Rule in this case, results in the presumption that the first monies expended after the refund checks were received and deposited into the Citibank Account were any other monies deposited into the Account by Button or Wendy Button before or after the refund checks were deposited. If, after employing this Rule, there were any funds in the Citibank Account when Button received the Refund Demand, his failure to determine that, obtain those monies and immediately pay them over to the Trustee constitutes a continuing concealment and transfer of property of the estate with actual intent to hinder and delay the Trustee. If that was the case, that would be an additional basis upon which Button's discharge must be denied.[5]

IV. Overview

Mallory Duncan, Vice President and General Counsel for the National Retail Federation, was recently quoted in the National Press as saying: "It's really disappointing that so many people are using the bankruptcy system like a car wash." In this time of record filings when more and more Chapter 7 debtors are filing not as the result of a traditional catastrophic event, such as a significant job loss, a matrimonial or a severe medical problem, but because of the mismanagement of their financial affairs in obtaining or accepting overextensions of credit and overspending, more and more of these debtors and their attorneys do appear to this Court to be approaching the bankruptcy system as if it is in fact an "automatic car wash." In their Chapter 7 cases they act as if the debtor's obligation is to pay a small fee up front, put themselves in neutral, glide along through the system paying absolutely no attention to what is going on, what their duties are or what is required of them,

[5] This can only be determined from a full and complete accounting.

and then to somehow come out squeaky clean at the end with a "fresh start". In addition, more and more debtors have the attitude that a bankruptcy "fresh start" is a right rather than a privilege that they have to in part earn by fulfilling their duties under Section 521. Many debtors do not carefully read and fully complete their bankruptcy schedules and statements or focus on and perform the duties required of them under Section 521.

What is more disturbing is that in more and more cases, it does not appear that the debtor's attorneys have fully advised them or their duties and the system's expectations for them, and many debtors and their attorneys seem to have a "don't ask, don't tell" relationship and philosophy when it comes a debtor's duties to the bankruptcy system. In addition, more and more debtors and their attorneys seem to have a mind set that the trustee and the system are their adversary, rather than seeing themselves as operating in a fiduciary capacity towards their bankruptcy estate and the bankruptcy system, and being obligated to fulfill the duties required of them under Section 521 in order to earn their "fresh start", the important benefit that they are requesting of the system.

Because of this increasingly alarming trend, nationwide, creditors and panel trustees have begun to file more and more complaints requesting that courts, including this Court, deny or revoke debtors' discharges pursuant to Section 727, and more related criminal referrals are being made. As a result of the increased numbers of adversary proceedings under Section 727 and greater scrutiny by the system of debtors' actions and omissions, this Court has recently found itself denying and revoking more discharges. Denying or revoking a debtor's discharge is never something that a court does lightly, however, in appropriate circumstances it is something that a court must do in order to preserve the integrity of the bankruptcy system and to assure that in the future debtors and their attorneys do not have the "automatic car wash" philosophy or the mind set that the bankruptcy

system, which they are requesting such important benefits from, is also something that they can play games with. Debtors and their attorneys must focus on their duties, including the debtors' duties under Section 521, and debtors must realize that a bankruptcy "fresh start" is a privilege, not a right, and that they must do their part to earn it.

As for the system itself, including trustees, it must continue to be diligent in insuring that debtors are aware of their duties and the expectations of the bankruptcy system for them. With the increased filings and many debtors filing *pro se* or being represented by attorneys who do not regularly practice in the Bankruptcy Courts, trustees can no longer assume that debtors are fully aware of their duties and the expectations that the bankruptcy system has for them.[6]

In this case, Button's almost defiant failure to provide an accounting for the receipt, deposit and disbursement of the Refunds, almost inexplicable failure to have made any attempt whatsoever upon receiving the Refund Demand to determine whether there were still any unexpended portions of the Refunds, so that if there were any he could immediately obtain them and turn them over to the Trustee, and his equally inexplicable attitude that he had no obligation to turn over any of the Refunds, even up to the undisputed amount of $3,300, until his dispute with the Trustee as to the actual amount of the estate's interest was fully resolved, are completely unacceptable.

CONCLUSION

[6] The panel of Chapter 7 trustees might even consider: (1) preparing a hand-out clearly setting forth a debtor's duties and the expectations which the trustee and the bankruptcy system have for debtors, and delivering a copy to debtors and their attorneys at the Section 341 meeting; and (2) setting an expectation that attorneys who have received the hand-out in the past will go over it with future debtors at the time they sign their petition.

Button's discharge is denied pursuant to Section 727(a)(2)(B). However, within six months of this Decision & Order, Button can request that the Court vacate the denial of his discharge and grant him a discharge, provided that he has filed with the Court and the Trustee a full and complete accounting for the receipt, deposit and disbursement of the Refunds, along with all other income of Button or Wendy Button from the receipt of the refund checks to the time when the Refunds were fully expended, which shows that the Refunds were fully expended prior to his receipt of the Refund Demand. In this regard, oral explanations would not be sufficient to prove any disbursement; documentary proof of all disbursements is required. Furthermore, the required accounting must demonstrate that all of the Refunds were expended before Button received the Refund Demand utilizing the Trust Pursuit Rule.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: August 20, 1998